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R&R Industrial Park, LLC, Alumatek, Inc. and Repair Express, Inc. v. The Utah Property and Casualty Insurance Guaranty Association : Reply Brief

Utah Court of Appeals

IN THE UTAH COURT OF APPEALS

IN THE THIRD JUDICIAL DISTRICT COURT SALT LAKE COUNTY, SLAT LAKE DEPARTMENT STATE OF UTAH

R&R INDUSTRIAL PARK, L.L.C.; ALUMATEK, INC. and REPAIR EXPRESS, INC., Plaintiffs Appellees/Cross Appellants. **vs.** The Utah Property and Casualty Insurance Guaranty Association, Defendant Appellant/Cross Appelle.	**REPLY BRIEF OF CROSS APPELLANT ALUMATEK, INC.** Appellate Case No. 20070107-CA

APPEAL FROM JUDGMENT OF THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH
HONORABLE JUDGE J. DENNIS FREDERICK

Oral Argument Requested

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STATEMENT OF ADDITIONAL FACTS RELATED TO UPCIGA'S ARGUMENT THAT ALUMATEK HAS FAILED TO MARSHAL THE EVIDENCE

1. The only Finding of Fact in which the trial court discussed settlement agreement was No. 7, which states:

> The Court finds there was an agreement dated May 6, 2003, between the parties that provided UPCIGA would make automatic payments of $300,000 to R&R and Alumatek if they prevailed in the declaratory judgment action based upon representations by R&R and Alumatek that their damages greatly exceeded $300,000. This agreement is not enforceable as R&R failed to disclose it had received insurance monies for lost rent damages, and R&R and Alumatek must meet their burden of proof before they are entitled to any damages. (R. 3452)

2. The trial court also made the following Conclusions of Law with regard to Alumatek and the settlement agreement:

> 3. The agreement that UPCIGA would automatically pay R&R and Alumatek $300,000 if UPCIGA lost the declaratory judgment action is no longer valid as to Plaintiffs as it was based on less than accurate representations regarding insurance proceeds received by R&R and damages allegedly sustained by Alumatek. (R. 3457).
>
> 15. Alumatek's evidence of damages is deficient because it is based upon projections, ratios and unfounded estimates rather than invoices and bills of increased costs following the fire that can be compared with expenses in the years following the fire if the pre-fire financial data is not available. (R. 3460).
>
> 16. Alumatek's alleged loss of "operational efficiencies" is not a valid, objective, identifiable or well-founded basis to support any loss of income to Alumatek. (R. 3461).

18. The damage calculations of John Boekweg were not based upon methodologies that are a type reasonably relied upon by those in the accounting profession and accordingly his testimony was unpersuasive. (R. 3461).

19. Testimony of Patrick Kilbourne regarding the lack of damages was more credible and persuasive than the testimony and analysis of John Boekweg. (R. 3461).

3. In the trial court's minute entry ruling on Alumatek's second objection to the Findings of Fact and Conclusions of Law, it stated:

1. Objector's request for oral argument on their objections is declined. The matter is ruled on rule 7 urcp. (R. 3431).

2. The objections are denied as the Findings of Fact and Conclusions of Law and Judgment comport with this Court's ruling . . . (R. 3431).

ARGUMENT

I. THE REQUIREMENT TO MARSHAL THE EVIDENCE DOES NOT APPLY TO ALUMATEK BECAUSE IT DOES NOT DISPUTE THE TRIAL COURT'S FINDINGS OF FACT

Alumatek is not required to marshal the evidence because it does not dispute the trial court's findings of fact. It is well settled law that "[t]he marshaling requirement applies only to challenges of factual findings, not to conclusions of law." (citation omitted) Eggett v. Wasatch Energy Corp., 94 P.3d 193, 203 (Utah 2004). In UPCIGA's reply brief, it argues that Alumatek should be summarily dismissed because Alumtek has failed to marshal the evidence in

support of the findings of fact it challenges. However, UPCIGA misinterprets Alumatek's appeal and the trial court's Findings of Fact.

Nowhere in the Findings of Fact did the trial court state that Alumatek failed to disclose information or make misrepresentations. Thus, there was no finding of fact for Alumatek to challenge. The only thing Finding of Fact 7 says about the settlement is that "there was a settlement agreement . . . based upon representations by R&R and Alumatek," and that "[t]his agreement is not enforceable as R&R failed to disclose it had received insurance monies for lost rent damages it now claims." Alumatek does not dispute this finding of fact or any other finding of fact. Alumatek challenges the trial court's conclusion of law that its findings of fact warranted setting aside the settlement agreement.

UPCIGA makes this argument even though Alumatek has previously pointed out this deficiency in the trial court's findings of fact. Indeed, Alumatek objected to the trial court's first Findings of Fact and Conclusions of Law because it did not state that the settlement should be set aside as to Alumatek. When the trial court produced an amended Findings of Fact and Conclusions of Law, Alumatek again objected because its conclusions of law were not supported by its findings of fact. Nevertheless, even when Alumatek pointed out that the findings of fact failed to state any act or omission on the part of Alumatek that justified

ignoring the agreement, the court merely denied oral argument and produced a minute entry denying the objection because "the Findings of Fact and Conclusions of Law and Judgment comport with the Court's ruling." This of course was completely unhelpful considering that Alumatek's objection was that the findings of fact were unclear.

In other words, even when Alumatek essentially asked the trial court to find a fact supporting its conclusion, so that Alumatek could challenge it on appeal, the trial court basically looked the other way and denied its objection without clarification. Considering the absence of findings of fact with regard to Alumatek and Alumatek's relentless efforts to have them clarified, the marshaling requirement cannot apply to Alumetek,

II. THE TRIAL COURT'S DECISION TO SET ASIDE THE SETTLEMENT SHOULD BE REVERSED BECAUSE IT INCORRECTLY APPLIED THE LAW TO THE FACTS

The Court of Appeals should reverse the trial court's decision to set aside the settlement agreement because the trial court misapplied the law to the facts. The law is clear that a negotiated, written settlement agreement can only be set aside for "illegality, fraud, duress, undue influence or mistake." Matter of Estate of Chasel, 725 P.2d 1345, 1348 (Utah 1986). In this case, the trial court did not find any of these on the part of R&R or Alumatek. Because there was no such

finding, the trial court's decision to set aside the agreement is not supported by law and must be reversed.

In the alternative, the Court of Appeals must decide whether the allegations made by the trial court against Alumatek in its Conclusions of Law measure up to "illegality, fraud, duress, undue influence or mistake," for the purpose of setting aside the settlement agreement. Id. In its Conclusions of Law, the trial court states that (1) Alumatek made "less than accurate representations" regarding its damages; (2) Alumatek's damages were based on "projections, ratios and unfounded estimates;" (3) Alumtake's "loss of efficiencies" claim was not a "well-founded basis" for damages; and (4) Alumatek's expert's calculations were "unpersuasive," and that he was less "persuasive" than UPCIGA's expert.

The only legal basis for setting aside the agreement that even tangentially relates to these allegations is fraud. Moreover, in setting aside the agreement, the trial court relied on Quinn v. City of Kansas City, Kan., a fraud case.[1] 64 F.Supp.2d 1084 (D. Kan. 1999). However, even fraud requires several elements that were not found by the trial court and that do not exist in this case. Among

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[1]The other case the trial court relied on was Adams v. Reed, 11 Utah 480, 40 P.720 (1895). In the one-hundred years that have passed since that case, Utah courts have articulated the elements of fraud in greater detail. See e.g. Andalex Resources, *Inc. v. Myers*, 871 P.2d 1041, 1046 (Utah App. 1994). Although Adams is still on the books, following more recent decisions will likely increase the predictability that is sought in the judicial system.

other things, for fraud, the representation must be false and either made while the representing party knew it was false or recklessly knew there was insufficient information to make the representation, and the relying party must have reasonably relied on the representation in ignorance of its falsity. Andalex Resources, Inc. v. Myers, 871 P.2d 1041, 1046 (Utah App. 1994).

In Quinn v. City of Kansas City, Kan., these factors were present. 64 F.Supp.2d 1084. The plaintiff knowingly lied in his deposition and the defendant was reasonable to rely on such statements given that they were made under oath. Id. Contrarily, the case at hand is different from Quinn and none of these factors are present, notwithstanding UPCIGA's defense of Quinn in its brief.

The trial court did not find or conclude that Alumatek's representations were false. It merely stated that the representations were "less than accurate," not "well founded," and "unpersuasive." None of these are synonymous with false. Just because evidence is not conclusive, does not mean it is false. Rather, these statement merely go to whether Alumatek met its burden of proving damages (even though the agreement clearly stated it had no such burden as to the first $300,000), not whether its representations were false.

Moreover, because Alumatek's representations were not false, it could not have made them while knowing they were false. The fact that Alumatek proffered fact and expert testimony and calculated damages shows that it believed Alumatek was entitled to damages. Thus, Alumatek did not have the knowledge requirement to sustain a finding of fraud.

Finally, UPCIGA negotiated the settlement. By the time negotiations began, the case had been litigated for over a year. As a result, UPCIGA had the opportunity to review all of Alumatek's financial data, depositions, and expert reports (including those which Judge Frederick ended up disagreeing with), and the expert reports that the defendant had produced. Its opportunity for review was further safeguarded by its own counsel and the involvement of CDR's counsel.

At that time, UPCIGA had the opportunity to either enter a settlement agreement based on that information or to wait and see if the calculations and opinions were realized. It chose the former. Thus, it cannot be said that UPCIGA relied on Alumatek's representations in ignorance of their true meaning. On the other hand, if Judge Frederick thought the representations were unpersuasive, UPCIGA acted unreasonably in entering the agreement based on the same. Either way, Alumatek should not have to bare the burden of UPCIGA's decision. As

such, the allegations made by the trial court in its Conclusions of Law could not possibly constitute a fraud and dismissal of the agreement was incorrect.

In sum, UPCIGA chose to rely on Alumatek's representations in entering the agreement without waiting to see if the calculations and opinions would be realized. Having done so, UPCIGA should not be allowed to ignore its contract because in hindsight, those calculations and opinions it chose to rely on were not realized. Nor should the trial court be allowed to essentially go back in time and substitute its decision for that of UPCIGA. Indeed, the Court of Appeals should follow the reasoning of Blackhurst v. TransAmerica Ins. Co., where the Supreme Court declared: "[a]t the time of settlement, both parties undertook a risk that the resolution of the uncertainty might be unfavorable. This Court will not nullify a settlement contract because one of the parties would have acted differently if all the future outcomes had been known at the time of the agreement."[2] 699 P.2d 688, 692 (Utah 1985). In accordance with Blackhurst, the Court of Appeals should reverse the trial court's decision to set aside the settlement agreement.

[2]In UPCIGA's attempt to distinguish the cases cited in Alumatek's opening brief, UPCIGA failed to distinguish Blackhurst from the case at bar.

CONCLUSION

Alumatek is not required to marshal the evidence because it does not dispute the trial court's findings of fact. The trial court set aside the settlement agreement as to Alumatek without finding facts that support such a conclusion. Thus, Alumatek disputes the trial court's legal conclusion that its findings of fact warranted setting aside the settlement agreement. Because the findings of fact relied on by the trial court do not constitute fraud or any other legal basis for invalidating the settlement agreement, the trial court was incorrect in setting it aside.

Therefore, Alumatek respectfully requests that the Court of Appeals reverse the trial court's decision to set aside the settlement agreement and that it declare the agreement enforceable as a matter of law, or in the alternative, that it remand this case to the trial court to make findings and conclusions consistent with this Court's decision.

DATED this 19th day of November, 2007.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing has been delivered to the following parties on this ____ day of November, 2007.

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ADDENDUM